

IN THE MATTER OF THE ARBITRATION BETWEEN:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

and

CITY OF PHILADELPHIA.

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)
) **Case No. 14 390 00188 10**
) **P.O. Mills/Demotion**
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)

APPEARANCES

For the FOP: *Mac L. Gelman, Esquire*
Jennings Sigmund, LLP

For the City: *Shant H. Zakarian, Esquire*
Assistant City Solicitor

Arbitrator: Charles D. Long, Jr., Esquire

Date of Hearing: May 26, 2011

Date of Decision: June 14, 2011

BACKGROUND

On October 27, 2009, the Police Commissioner authorized the demotion of the Grievant, Michal Mills, from the rank of Sergeant to that of Police Officer. The Notice of Intention to Demote, dated November 13, 2009, provides:

CONDUCT UNBECOMING AN OFFICER, Section 1.00: Unspecified.

In that Internal Affairs investigation, IAD#08-1147 determined that

you engaged in unprofessional and/or unethical interaction by you, a supervisor, with Ms. C [REDACTED] and other female detainees in the Police Detention Unit. During interviews with Police Detention Unit employees, several members had comments/concerns about your behavior concerning female detainees. During your interview on 03/25/09, you admitted that you have exchanged phone numbers with several females in police custody who you knew. You also admitted exchanging phone numbers with a female J [REDACTED] who was in real estate. All these transactions were done while you were working as a police supervisor in the Police Detention Unit and the females were being detained in the Detention Unit. These exchanges were unprofessional and not done in the performance of your duties as a police supervisor.

CONDUCT UNBECOMING AN OFFICER, Section 1.75: Repeated violations of Departmental rules and regulations, and/or any other course of conduct indicating that a member has little or no regard for his/her responsibility as a member of the Police Department.

In that on Sunday, 11/16/08, while assigned to the Police Detention Unit, you denied Immigration and Customs Enforcement (ICE) Agent D [REDACTED] E [REDACTED] reasonable access to investigate prisoner, L [REDACTED] C [REDACTED], who was inside Police Detention Unit after her Arrest for Driving Under the Influence. You were informed by Agent B [REDACTED] that Ms. C [REDACTED] came up on the PARS systems as being born in [REDACTED] and that she was a person of interest whom Agent B [REDACTED] needed to question. You would not allow Agent B [REDACTED] to formally interview Ms. C [REDACTED]. You told Agent B [REDACTED] that you needed to get Ms. C [REDACTED] out because she had already missed one flight and needed to catch a plane to California. You further told Agent B [REDACTED] that he had the time until you could get her out of the building to "do what you got to do." You would not permit Agent B [REDACTED] to fingerprint Ms. C [REDACTED] telling him that you would not get her out of line. Agent B [REDACTED] was able to obtain Ms. C [REDACTED] name, social security number and date of birth, information which he called into his supervisor, Agent J [REDACTED] R [REDACTED] to run ICE checks. Approximately three minutes elapsed when Agent R [REDACTED] called back to inform Agent B [REDACTED] that Ms. C [REDACTED] was illegally in the United States. However, you had personally already escorted Ms. C [REDACTED] out of the building, contrary to the normal procedure at the Police Detention Unit. Once outside, you engaged Ms. C [REDACTED] in a lengthy conversation. You went back inside the building, leaving again several minutes later, when you drove your private vehicle and picked up Ms. C [REDACTED]. While Ms. C [REDACTED] was in cell block, you were observed stopping by several times during your tour to speak with her specifically, one instance for approximately one hour. There is no legitimate explanation why you would have denied a fellow law enforcement official access to a prisoner to conduct a proper

investigation when requested. You, thereby, assisted in the escape/eluding capture of Ms. C [REDACTED] who was in the United States illegally. An independent investigation was conducted and it has been determined that just cause exists to conclude you have violated the Police Department's policies and/or disciplinary code. You have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department.

NEGLECT OF DUTY, Section 4.15: Failure to properly supervise subordinates; or to prefer disciplinary charges, or to take other appropriate disciplinary action.

In that on Sunday, 11/16/08, you worked the 7:00 am to 3:15 tour of duty, assigned to the Detention Unit. On this date, Corporal C [REDACTED] R [REDACTED] was working her Shift Day Off, earning eight (8) hours overtime as an Absentee Replacement for the 7 :00 am to 3:00 pm tour of duty. Approximately 12:00 pm, you permitted Corporal C [REDACTED] R [REDACTED] to leave before completing her tour of duty. You were aware that Corporal R [REDACTED] was earning overtime for working on this day in that you certified the Daily Attendance Report at 12:20 pm. Not only did you allow Corporal R [REDACTED] to leave early, you did not reflect that she left early on the Daily Attendance Report.

Your course of conduct shows that you have little or no regard for your position as a Police Sergeant. Therefore, you will be demoted to the rank of Police Officer.¹

Unable to resolve the resulting grievance, the Union filed for arbitration. A hearing was held on May 26, 2011, at which the parties presented testimony, documentary evidence and closing oral argument in support of their respective positions. The deposition of the Police Commissioner was entered into evidence as a joint exhibit. The following discussions and decision result from the record thus compiled.

ISSUE

The parties stipulated to the following issue:

Was the disciplinary demotion and transfer of the grievant for just cause?
If not, what is the appropriate remedy?

¹ The Grievant was also transferred out of the Police Detention Unit to the 39th District.

PERTINENT CONTRACT PROVISIONS

IV. Management Rights

The City, consistent with sound discretion, possesses the right, in accordance with applicable laws, to manage all operations, including but not limited to the direction of the workforce and the right to plan, direct and control the operation of all equipment and other property of the City, except as modified by this Award and those provisions of the agreement which are not inconsistent with or contrary to the exercise of such discretion. . .

XX. DISCIPLINE AND DISCHARGE

A. General

No employee shall be disciplined or discharged except as is consistent with the Home Rule Charter and the Regulations of the Civil Service Commission.

E. Written Reprimands in Personnel File.

Written reprimands in a personnel file shall be removed from the record after two (2) years if the employee receives no further written reprimands or further disciplinary action within that period.

DISCUSSION

The just cause standard consists of two (2) essential elements: 1) proof of the underlying incident; and (2) a showing that the discipline was appropriate considering all of the relevant surrounding circumstances. The burden of proving both elements rests with the employer.

As set forth in the Notice of Intent to Demote, the charges against the Grievant result from the following conduct attributed to him: 1) engaging in unprofessional/unethical conduct with female detainees, specifically exchanging telephone numbers; 2) permitting subordinates to leave early without recording their non-

working hours and failing to dock their pay for the time not worked; and 3) the incident on November 16, 2008, involving Ms. C [REDACTED]

As corroborated by his sworn deposition, the Police Commissioner considered the C [REDACTED] incident the most serious and without which he would not have imposed the penalty of demotion and transfer. Consequently, the critical issue is whether the evidence, as it relates to this element of the overall charge, supports the discipline imposed. For the following reasons, I conclude it does not.

Because a demotion has a serious if not fatal impact upon a police officer's career, the parties agree that it is the most serious penalty an officer can suffer, second only to discharge. While the City need not prove its case beyond a reasonable doubt, it is both fair and reasonable that it be required to support the discipline by clear and convincing evidence.

Considered together, factors are present in this matter which are cause for concern. D [REDACTED] B [REDACTED], the Immigration Agent, did not consider the November 16th incident sufficiently serious to compel him to warrant his filing a report with his supervisor. The written report he ultimately filed was not until ten (10) days following the incident and then, as he testified, only upon request of his supervisor who had been informed of the incident by a civilian correctional officer not employed by the Police Department..

The Notice of Intent to Demote charges the Grievant with not permitting Agent B [REDACTED] to fingerprint Ms. C [REDACTED]. The Grievant testified Agent B [REDACTED] did not request to do so but requested only that he be permitted to speak with her, which he did. Although Agent B [REDACTED] testified at the arbitration hearing that he requested to fingerprint

Ms. C [REDACTED] his written statement of November 16, 2008, states only that he, "needed to speak with the subject", consistent with the Grievant's testimony.

Police Sergeant S [REDACTED] C [REDACTED] testified without contradiction that pre-arraignment processing at the Detention Unit includes fingerprinting detainees. No explanation was offered concerning why a second set of fingerprints was required. Furthermore, it is likewise undisputed that by the time Agent B [REDACTED] arrived at the Detention Unit Ms. C [REDACTED] arraignment had concluded and she had been released from custody on her own recognizance.

The Grievant testified that after a detainee is released from custody following arraignment, in the absence of a detainer the police are without authority to detain that person any longer. Agent B [REDACTED] testified that after arraignment a person's departure can be "slowed down." Agent B [REDACTED] further testified that a detainer can be filed when, as was the case here, the subject's identification is known.

The unrefuted evidence during the arbitration hearing also established that detainers are frequently faxed to the Detention Unit before an Immigration Agent arrives. Agent B [REDACTED] acknowledged that it is not uncommon for a detainer to be informally filled out "on the fly" after an Agent has arrived at the Detention Unit and "formalized later."

At the time of the incident in question, Agent B [REDACTED] was a relatively new agent with the Immigration Service having with less than three (3) months experience. He testified that the information he gleaned from his short discussion with Ms. C [REDACTED] [REDACTED] was sufficient for him to have drafted and served her with a detainer had he chosen to do so. However, being new, he wanted to first check with his supervisor.

Unfortunately, his supervisor's computer was down and required rebooting. Although only a matter of three (3) to five (5) minutes passed, by the time Ms. C [REDACTED] status was determined she had left the building.

Agent B [REDACTED] acknowledged that he did not look outside to determine if Ms. C [REDACTED] was still in the immediate area. Had he done so he might have found her standing outside the door through which the detainees exited or sitting in the Grievant's truck. The Grievant testified that it was a cool evening and as he passed by the entrance to the Detention Unit in his truck on his way home, he stopped to wish Ms. C [REDACTED] well. She asked if she could sit in his truck for warmth until the limousine taking her to the airport arrived. Shortly thereafter, the limousine arrived and Ms. C [REDACTED] got out of the Grievant's truck and left for the airport in the limousine, and the Grievant proceeded to drive home. During that time, the Grievant was off-duty on his way home and Ms. C [REDACTED] was no longer in custody.

The Notice of Intent to Demote also provides that by his actions the Grievant, "assisted in the escape/eluding capture of Ms. C [REDACTED] who was in the United States illegally." Within the context of all of the surrounding circumstances, this conclusion is, at the very least, an overstatement. The evidence does not establish that Ms. C [REDACTED] was an illegal immigrant. The evidence concerning this issue was vague and uncertain, establishing that rather than entering the country illegally it was more probable that she was in the country on a limited status visa.

The Notice of Intent to Demote also alleges that the Grievant, "personally escorted Ms. C [REDACTED] out of the building contrary to the normal procedure at the Police Detention Unit." This allegation is unsubstantiated by any credible evidence.

To the contrary, the uncontradicted testimony of Police Sergeant C [REDACTED] and Correctional Officers R [REDACTED] D [REDACTED] and S [REDACTED] D [REDACTED] establish that when a line of detainees leaves the Detention Unit they are escorted by two correctional officers, one at the front of the line and the other at the back of the line. Depending upon the number of detainees being released at one time, they may also be escorted out by the Sergeant on duty. Both Correctional Officers D [REDACTED] and D [REDACTED] were present on November 16, 2011, and testified they observed the Grievant assist by leading the line, which included Ms. C [REDACTED] out of the building.

Having had the opportunity to listen first-hand to the sworn testimony of the witnesses and observing their demeanor while testifying, I conclude that the timing of the departure of Ms. C [REDACTED] from the Detention Unit resulted from a combination of unique circumstances not attributable to arbitrary positions taken by the Grievant. Regardless, his conduct on November 16, 2008, did not constitute a "course of conduct indicating that a member has little or no regard for his/her responsibility as a member of the Police Department," as required by Section 1.75 , of the Departmental Disciplinary Code.

Concerning the charged violation of Section 1.00 of the Departmental Disciplinary Code, the Notice of Intent to Demote provides, inter alia, "The Internal Affairs investigation, IAD#08-1147 determined that you engaged in unprofessional and/or unethical interaction by you, a supervisor, with Ms. C [REDACTED] and other female detainees in the Police Detention Unit. During interviews with Police Detention Unit employees, several members had comments/concerns about your behavior

concerning female detainees.” This is an incriminating accusation and one which requires clear and convincing substantiation.

The Grievant acknowledged two (2) instances in which he exchanged telephone numbers with a woman named “J [REDACTED]” whom he knew from a prior real estate interaction and a prior student whom he had taught at Penn State University while an adjunct professor. The woman named J [REDACTED] asked him for the telephone number of the Public Defender which he provided along with his personal number and work number should she desire further assistance. He testified that he has not seen or spoken with her since.

No evidence was provided to the arbitrator identifying the other alleged incidents or the female detainees involved and, more importantly, no testimony was offered from witnesses having direct knowledge of other incidents. The other alleged incidents constitute uncorroborated hearsay which was accorded no weight in deciding this matter.

Correction Officer D [REDACTED] D [REDACTED] testified that he reported two (2) prior incidents when the Grievant exchanged telephone numbers with female detainees. Yet, there is no evidence, indeed no claim, that follow-up action by a superior officer resulted. More importantly, his claim is unsubstantiated by any specific information. Based upon the evidence of record, two incidents over the ten (10) year period the Grievant served as a Sergeant at the Detention Unit do not constitute a “course of conduct” required to support a finding of a violation of Section 1.00, of the Departmental Disciplinary Code.

The alleged incidents of unprofessional/unethical interaction by the Grievant towards Ms. C [REDACTED] are similarly unsupported by any direct evidence and, therefore, constitute uncorroborated hearsay which is entitled to no weight. Notably,

when the IAD Investigator spoke by telephone with Ms. C [REDACTED] in California no questions were asked concerning issues of improper/unethical conduct on the part of the Grievant.

The charge of violating Section 4.15 of the Departmental Disciplinary Code is more problematic for the Grievant who acknowledged permitting Police Sergeant R [REDACTED] to leave early on November 16, 2008, to go to church during a difficult time in her life and not docking her pay for the hours she missed. His explanation was that he simply forgot to record her leaving early and adjust her pay when filling out the PARS report at the end of the shift.

Although he could not identify the date, Corrections Officer D [REDACTED] D [REDACTED] testified there was a second similar incident in which the Grievant permitted Sergeant R [REDACTED] to leave early without docking her for the time missed. Considering his position as a corrections officer not in Sergeant R [REDACTED] chain of command, without some corroboration his testimony in this regard is suspect and was accorded no weight.

However, the testimony of R [REDACTED] D [REDACTED] that the Grievant has periodically excused him from work early without docking his pay is uncontroverted. Both Corrections Officer D [REDACTED] and the Grievant testified that Correction Officer D [REDACTED] frequently works through lunch and break so that he works a full day even when permitted to leave a few minutes early.

Regardless of the Grievant's explanation, permitting subordinates to leave work early without adjusting their hours and reducing their pay is not an acceptable supervisory practice and constitutes a "Failure to properly supervise subordinates in violation of the Section 4.15, of the Departmental Disciplinary Code.

In attempting to establish “just cause,” the record created by the parties at the arbitration hearing dictates the outcome of the dispute. Unfortunately, the Commissioner, in making his final determination, had no first-hand knowledge concerning what occurred but relied exclusively on the input he received from the Police Board of Inquiry. The underlying facts established by the credible evidence presented at the arbitration hearing rather than the results of the investigation conducted by the IAD or the findings and recommendations of the Police Board of Inquiry dictate the resolution of the matter being arbitrated.

Having absolved the Grievant of violating Sections 1.00 and 1.75, of the Departmental Disciplinary, no discipline for either is warranted. Concerning the charge of violating Section 4.15, of the Departmental Disciplinary Code, the range of penalties for a first offense is “Reprimand to 5 days and/or demotion.” When appropriate, seniority and prior performance customarily serve as either mitigating or aggravating factors. But for a one (1) day suspension in June 2001, the Grievant has an unblemished performance record during his twenty (20) years as a police officer including ten (10) as a Sergeant.² As acknowledged by the City, the Grievant testified that he has never received an unsatisfactory performance evaluation.

DECISION

1. The grievance is granted in part and denied in part.
2. The Grievant’s conduct did not constitute a violation of Section 1.00, of the Disciplinary Code, as alleged.

² That discipline was subject to expungement after two (2) years pursuant to Article XX, Section E., of the collective bargaining agreement.

3. The Grievant's conduct did not constitute a violation of Section 1.75, of the Disciplinary Code, as alleged.
4. The Grievant's conduct did constitute a violation of Section 4.15, of the Disciplinary Code, as alleged.

REMEDY

1. The Grievant's demotion and transfer are rescinded.
2. The Grievant is to be promptly reinstated to his former rank of Sergeant and to his former assignment at the Police Detention Unit.
3. For his violation of Section 4.15, of the Disciplinary Code, the Grievant is to receive a 5 day disciplinary suspension. Because the violations of 4.15 occurred over three (3) years ago, the suspension is a paper suspension resulting in no lost time or loss of pay.
4. All reference to the Section 1.00 and 1.75 violations and any associated discipline are to be removed from the Grievant's file and replaced with a record of the Section 4.15 violation and the resulting five (5) day paper suspension.³
5. All other discipline is dismissed.
6. Except for the five (5) day paper suspension, the Grievant is to be made whole for all lost straight-time and overtime wages and any other emoluments of employment resulting from the his demotion and transfer.
7. The arbitrator will retain jurisdiction for a period not to exceed forty-five days for the limited purpose of clarifying the remedy, should either party so request.

June 14, 2011
(Date)

Charles D. Long, Jr.
Charles D. Long, Jr., Esquire,
Arbitrator

³ This discipline is also subject to expungement pursuant to Article XX, Section E, of the collective bargaining agreement.